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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO VASQUEZ et al.,

Defendants and Appellants.

B203597

(Los Angeles County
Super. Ct. No. BA318669)

APPEALS from judgments of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Judgment as to Vasquez is affirmed. Judgment as to Sanchez is affirmed as modified.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant Armando Vasquez.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Senan Rene Sanchez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Vasquez and Senan Rene Sanchez appeal from the judgments entered after a jury convicted them in a joint trial of selling cocaine base and possessing cocaine base for the purpose of sale. Vasquez and Sanchez contend the court improperly permitted the investigating police officer to provide certain expert testimony and argue their trial attorneys were ineffective for failing to object to the testimony. Vasquez and Sanchez also challenge the propriety of their sentences. We modify Sanchez's sentence to correct a sentencing error and, in all other respects, affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

Vasquez and Sanchez were each charged in an information with selling or offering to sell a controlled substance (cocaine base) (Health & Saf. Code, § 11352, subd. (a))¹ and possession for sale of a controlled substance (cocaine base) (Health & Saf. Code, § 11351.5). The information specially alleged Vasquez had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and had suffered two prior drug-related convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a), and Sanchez had served three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and had suffered three prior drug-related convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). In addition, it was specially alleged that Sanchez had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

¹ The information initially charged Vasquez and Sanchez with the sale/transportation of cocaine. During trial that allegation was amended to allege the sale/transportation of cocaine base.

2. The Trial

Vasquez and Sanchez pleaded not guilty and denied the special allegations. Trial of the substantive offenses was bifurcated from the trial of the separately pleaded enhancements.

According to the evidence at trial, Los Angeles Police Detective Charles Baley, working undercover on a stakeout, observed Vasquez approach Sanchez on the street and engage him in a brief conversation. Vasquez walked to a tent in a nearby parking lot, remained inside the tent for two minutes and then returned to Sanchez. As he approached Sanchez, Vasquez handed him a small clear plastic bag, approximately the size of a quarter, containing several pieces of an off-white substance that later proved to be cocaine base. As Vasquez left Sanchez to return to the tent, another man, Angelo Boston, approached Sanchez and handed him money. Sanchez took the money with one hand, removed one white rock of cocaine from his pocket with the other hand and gave the rock to Boston.

Detective Baley alerted the other police officers participating in the investigation, and Sanchez and Boston were arrested. Following Sanchez's and Boston's arrest, Los Angeles Police Officer Thomas Brown approached the tent where Detective Baley had seen Vasquez. Once inside the furnished tent, Brown saw Vasquez and a woman, Roxy Verner, and observed a small plastic bag with a substance later confirmed to be cocaine base on top of a make-shift nightstand in plain view near where Vasquez was standing. Vasquez and Verner were arrested.

3. The Verdict, Bifurcated Trial on Special Allegations and Sentence

The jury found Vasquez and Sanchez guilty on each count charged in the information. After Vasquez and Sanchez waived their rights to a jury trial on the specially alleged prior conviction and prior prison term allegations, the trial court found the special allegations true. Vasquez was sentenced to an aggregate state prison term of 12 years. Sanchez was sentenced to an aggregate state prison term of 22 years.

DISCUSSION

1. *The Admission of Detective Baley's Testimony Is Not Reversible Error*

a. *Relevant proceedings*

At trial Detective Baley testified as both a percipient and expert witness. As a qualified expert on the sale of cocaine base, Baley opined, without objection, that Vasquez and Sanchez possessed the cocaine base for sale. As to Sanchez, Baley explained his opinion was based on his experience conducting drug investigations and “observations, which included observing Mr. Sanchez accept money and then give Mr. Boston the off-white solid in return for that.” He also explained the overwhelming majority of sellers of rock cocaine in the area were also addicts who sold to support their habit, and opined that Sanchez would have likely sold the remainder of the cocaine base in his possession if given the opportunity. As to Vasquez, Baley explained his opinion was based on “the fact that I saw Mr. Vasquez meet with Mr. Sanchez, and then go to the tent, and then come back to where Mr. Sanchez was and give him an item, which I later noticed to be suspected cocaine base. So the activity of him going to the tent and then coming back, giving an item, and then subsequently seeing Mr. Sanchez sell [the] item from that bindle, that’s why I formed that opinion.”

b. *Governing law on possession for sale and use of expert testimony*

Expert testimony is admissible if it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a); see also Evid. Code, § 720, subd. (a) [“[a] person is qualified to testify as an expert if he has special knowledge” that would assist the trier of fact].) The question whether drugs are possessed for the purpose of sale is considered a matter beyond the experience of the average juror and is an appropriate subject for expert testimony. (See, e.g., *People v. Parra* (1999) 70 Cal.App.4th 222, 227; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1228.) For example, “‘experienced [police] officers may give their [expert] opinion[s] that the narcotics are held for purposes of sale based upon such matters as quantity, packaging, and normal use of an individual.’” (*Parra*, at p. 227; see also *People v. Hunt* (1971) 4 Cal.3d 231, 237.) In such cases, the police officer’s

expert opinion is based on his or her knowledge of the “habits of those who possess for their own use and those who possess for sale,” facts that are not necessarily known to laypersons. (*Hunt*, at p. 237.)

c. *Vasquez and Sanchez have forfeited their argument by failing to object to Detective Baley’s testimony at trial*

Vasquez and Sanchez contend the court erred in permitting Baley to opine that each of them possessed the cocaine base for sale. However, neither Vasquez nor Sanchez objected to Baley’s expert testimony at trial. Accordingly, those claims are forfeited on appeal. (See Evid. Code, § 353 [verdict or finding shall not be set aside based upon erroneous admission of evidence absent an objection or motion to exclude the evidence]; *People v. Zapien* (1993) 4 Cal.4th 929, 979 [“The reason for the requirement [that objection be made at trial] is manifest: A specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal”]; accord, *People v. Partida* (2005) 37 Cal.4th 428, 434.)

d. *Neither Vasquez nor Sanchez has established ineffective assistance of counsel*

Attempting to salvage their forfeited evidentiary challenge to Detective Baley’s expert testimony, Vasquez and Sanchez contend their trial attorneys were constitutionally ineffective in failing to object to the testimony. A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, but also that it is reasonably probable, but for counsel’s failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) “The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.” (*People v. Karis* (1988) 46

Cal.3d 612, 656.) There is a presumption the challenged action “‘might be considered sound trial strategy’” under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel’s challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 [“[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions”]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [“‘[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation” [citation], the contention [that counsel provided ineffective assistance] must be rejected’”].) “[T]he decision to object or not to object to the admission of evidence is inherently tactical, and a failure to object will seldom establish ineffective assistance.” (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 934-935.)

Vasquez and Sanchez do not dispute Detective Baley’s qualification as an expert witness or that the question of possession for purposes of sale is a proper matter for expert testimony. (See, e.g., *People v. Hunt*, *supra*, 4 Cal.3d at p. 237; *People v. Maldonado* (2009) 172 Cal.App.4th 89, 93.) Rather, they contend Baley’s opinion exceeded the proper scope of expert testimony because it was based solely on his “observations” as a percipient witness and not on any knowledge specific to his expertise. The contention is meritless. To be sure, Baley’s opinion that Vasquez and Sanchez possessed the cocaine base for sale was predicated on his observations of the drug transaction. But that opinion was also informed by Baley’s experience as a drug investigator and his knowledge of the habits of the sellers of cocaine base and the high incidence of drug sales in the area. Because there was nothing improper about Baley’s testimony (see Evid. Code, § 801, subd. (b) [expert witness testimony limited to opinion that is “[b]ased on a matter (including his special knowledge, skill, experience, training,

and education) *perceived by or personally known to the witness* or made known to him at or before the hearing, whether or not admissible, that is of a type that may reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates”], italics added), counsel was not ineffective for failing to object to it. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616 [“[b]ecause there was no sound legal basis for objections, counsel’s failure to object to the admission of the evidence cannot establish ineffective assistance”]; see also *People v. Diaz* (1992) 3 Cal.4th 495, 562 [failure to object to admissible evidence does not constitute ineffective assistance of counsel because objection would have been futile].)

Vasquez also asserts his counsel was deficient for failing to object to Detective Baley’s expert opinion testimony that Vasquez actually “possessed” the cocaine base on the nightstand.² Baley’s opinion testimony was elicited for the purpose of showing Vasquez either had control over the cocaine base found in the tent or had the right to control it. (See, e.g., CALCRIM No. 2302 [“A person does not have to actually hold or touch something, to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person”]; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1176 [same]; see also CALJIC No. 12.00 [possession is shown by proving “person exercised control over or the right to control” the illegal drugs].)

Vasquez’s contention that Detective Baley’s opinion as to his ability or right to control the cocaine base was not proper expert testimony appears to have merit. The People cite no authority, nor have we found any, suggesting that the question of dominion and control, at least in the circumstances presented in this case, is an appropriate subject for an expert opinion. Nevertheless, we need not determine the propriety of the testimony or whether counsel was ineffective in failing to object to it because, on this

² Vasquez highlights the following portions of Detective Baley’s testimony:

“[Prosecutor]: Do you have an opinion as to whether Mr. Vasquez possessed, maintained custody or control, over the one rock found on the nightstand in the tent?

“[Baley]: Based on the information that I have, it’s my opinion that, yes, he had access to that item that was on the stand.”

record, it is not reasonably probable Vasquez would have received a more favorable verdict had there been a sustained objection to this portion of Baley's opinion. (See *In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 697 [It is not necessary to determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."].)

The jury was presented with overwhelming evidence that Vasquez had control or the right to control the cocaine base found in the tent Vasquez occupied. Detective Baley saw Vasquez retrieve drugs from the tent. Officer Brown testified that Vasquez had been standing close to the drugs on the nightstand when he entered and that he appeared to have access to items in the tent. Moreover, the prosecutor did not mention, much less emphasize, Baley's opinion on Vasquez's right to control the cocaine found in the tent during closing argument, but rather highlighted the evidence, asking the jury, "How do we know that he possessed the rock on the nightstand? Well, because he already exercised control over drugs in the tent by going out of the tent and handing it to Sanchez for sale." In sum, even if counsel should have objected to Baley's testimony, the failure to do so was not prejudicial.

3. The Trial Court Was Aware of Its Power To Strike a Prior Conviction for Sentencing Purposes

Vasquez contends the trial court was unaware of its discretion to dismiss one or both of the prior drug-related convictions specially alleged under Health and Safety Code section 11370.2. (See Pen. Code, § 1385, subd. (a) [court may dismiss prior conviction allegation "in furtherance of justice"]; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; *People v. Carmony* (2004) 33 Cal.4th 367, 374 [court's refusal to strike a prior conviction under Pen. Code, § 1385 reviewed for abuse of discretion].) The record, however, reflects the court was very much aware of its discretion. Indeed, the court expressly stated it would not dismiss a prior drug-related conviction or run the

sentences concurrently “absent a good reason to the contrary, which I find none in our case.” The decision not to dismiss any of the prior convictions was not an abuse of the court’s broad discretion in such sentencing matters. (See *Carmony*, at pp. 374-375.)

4. *The Trial Court Properly Exercised Its Discretion in Concluding There Was No Discoverable Material in Detective Baley’s Personnel File*

Prior to trial Vasquez made a motion under Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 for a review of Detective Baley’s personnel records to determine whether he had a history of making false arrests or falsifying evidence. The trial court granted the motion, reviewed the records in an in camera hearing and found no discoverable information. At Vasquez and Sanchez’s request, we have reviewed the sealed record of the in camera proceedings, which included detailed descriptions of the documents in Detective Baley’s personnel file, and conclude the trial court’s order complied with all statutory and common law discovery requirements. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

5. *The People Concede the Trial Court’s True Findings on One of the Specially Alleged Prior Prison Terms Relating to Sanchez Is Not Supported by Substantial Evidence*

Penal Code section 667.5, subdivision (b), requires the trial court to impose a one-year enhancement for each prior separate prison term served for a felony. Here, the information alleged, and the trial court found true, that Sanchez had served three prior separate prison terms based on a conviction in July 1996 for assault under Penal Code section 245, subdivision (a)(1) (case No. BA129320); a May 1994 conviction for violation of Health and Safety Code section 11351.5 (case No. SA016791); and a June 2005 conviction for violation of Health and Safety Code section 11351.5 (case No. BA268866).

Sanchez maintains, and the People agree, the evidence presented to the trial court did not support the finding he had served three prior separate prison terms for felonies. Because he was initially placed on probation in case number SA016791, Sanchez’s prison term in that case was served concurrently with his prison sentence in case No. BA129320. Such concurrent prison terms, even though for separate convictions

obtained at different times, only justify imposition of a single prior separate prison term enhancement under Penal Code section 667.5, subdivision (b). (See *People v. Jones* (1998) 63 Cal.App.4th 744, 747 [“only one enhancement [under Pen. Code, § 667.5, subd. (b)] is proper where concurrent sentences have been imposed in two or more prior felony cases”]; accord, *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1669.) Accordingly, Sanchez should have been sentenced to two, not three, one-year enhancements under Penal Code section 667.5, subdivision (b).³

DISPOSITION

The judgment as to Vasquez is affirmed. The judgment as to Sanchez is modified, and the abstract of judgment ordered corrected, to impose only a single one-year enhancement under Penal Code section 667.5, subdivision (b), in connection with either case number SA016791 or BA129320. The superior court is directed to prepare a corrected abstract of judgment in conformity with this opinion and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment as to Sanchez is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

³ Sanchez filed a petition for writ of habeas corpus on June 13, 2008 asserting the same sentencing error he asserts here. Our holding that the trial court should have imposed only a single, one-year enhancement under Penal Code section 667.5, subdivision (b) in connection with either (but not both) case number SA016791 or BA129320 has rendered the petition moot. Accordingly, in a separate order filed concurrently with this opinion, we dismiss the petition as moot.